Mohamed Zahid Yon bin Mohamed Fuad & Anor v Fat Boys Records Sdn Bhd and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(IM)(NCC)-370–02 OF 2021, W-02(IM)(NCC)-371–02 OF 2021, W-02(IM)(NCC)-372–02 OF 2021, W-02(IM)(NCC)-408–02 OF 2021 AND W-02(IM)(NCC)-410–02 OF 2021
MOHAMAD ZABIDIN, NANTHA BALAN AND SEE MEE CHUN JJCA
2 JUNE 2022

Civil procedure — Judgments and orders — Setting aside — Setting aside of Anton pillar order — Order obtained on ex-parte basis — Whether there was non-disclosure of facts in relation to grant of Anton pillar order — Whether there was a strong prima facie case — Whether there was evidence that appellants would destroy evidence

There were six appeals heard together before the present court. They were Appeals 370, 371, 372, 408, 409 and 410. All were inter-related and arose from two decisions of the High Court judge ('HCJ') in dismissing the defendants ('appellants') applications to set aside an ex parte anton piller order ('APO') and granting the plaintiff's ('respondent') application for an inter parte APO. Appeals 372 and 409 which deal specifically with the HCJ decision in refusing stay, were withdrawn on the hearing day. In Appeals 370 and 371, the first appellant ('Zahid') was the chief executive officer ('CEO') of the respondent from 2007 until his suspension on 28 March 2019. He was also a director and shareholder. The second appellant ('FBSB') was a company of which Zahid was its sole shareholder and director. In Appeals 408 and 410, the first appellant ('FBGSB') was a company of which the second appellant ('Munir') was the sole shareholder and director. One of the co-founders of the respondent was Jason Jonathan Lo ('Jason') and he was the CEO from 27 September 2001. Zahid was appointed as director on 12 August 2003. Sometime in July 2007, Jason resigned as CEO and director of the respondent. Jason's 70% shares were held by Yakub bin Hussaini ('Yakub') via a declaration of trust. Zahid was then appointed the CEO and Yakub was appointed as director. As the CEO, Zahid was the sole signatory of the respondent's CIMB Bank Bhd ('CIMB') account which was the respondent's main account for all business transactions and the Bank Kerjasama Malaysia Bhd ('Bank Rakyat') account. He and Yakub were both signatories to the RHB Bank account which either one may sign. In October 2018, Zahid found out that Jason was appointed as director of the respondent through a shareholder' s written resolution and directors' resolution dated 9 July 2018. According to Zahid, these resolutions were never approved by him as one of the shareholders and directors of the respondent. Therefore, Zahid filed an originating summons ('first suit') to void the

appointment of Jason as a director. The court allowed an ex parte interim injunction against Jason to restrain him from holding himself out as director or carrying out any act or action as director. On 22 November 2018, a consent order was recorded where, amongst others, Jason was to resign as director. Subsequently, Zahid came to know that Yakub had appointed Jason again, as director of the respondent. Therefore, on 25 January 2019, Zahid filed an originating summons ('second suit') to invalidate Jason's appointment as director. The second suit was dismissed by the High Court and the appeal to the Court of Appeal and leave to appeal to the Federal Court was also dismissed. Zahid then filed another originating summons ('third suit') against the respondent and Yakub for oppressive conduct. The respondent then filed a civil suit ('fourth suit') against all the appellants. Arising from the fourth suit, an ex parte APO was granted. The High Court heard and dismissed the appellants' applications to set aside the ex parte APO. Aggrieved, the appellants appealed on the grounds, inter alia, that the respondent had not met the requirements to secure the ex parte APO. The reasons advanced were: (a) inordinate delay; (b) failure to make full and frank disclosure; (c) the documents could have been obtained by discovery ; (d) there was no extremely strong prima facie case; and (e) there was no evidence that the appellants would be destroying evidence.

Held, allowing the appeals:

(1) The duty of the respondent as the applicant to make a full and frank disclosure was contained in O 29 r 1(2A) of the Rules of Court 2012 ('the RC 2012'). A reading of the words 'any facts which may lead to the court not to grant the application ex parte or at all' in r 1(2A)(e) must relate to relevant material facts. In the instant appeals, there was no full and frank disclosure of relevant material facts as there was a non-disclosure of: (a) the CBT charges in the sessions court against Jason and Yakub which gave rise to the issue of whether the APO sought was a genuine remedy or an act of malicious revenge and retaliation against Zahid and by extension, the other appellants; and (b) the oppressive conduct wherein Zahid's interest as a member of the respondent had been disregarded with regard to the change of signatory to the CIMB account. It followed that non-compliance of O 29 r 1(2A)(e) of the RC 2012 must necessitate the ex parte APO to be set aside. As a consequence, the inter parte application must be dismissed (see paras 58–59, 61–62, 64, 68 & 74).

(2) The setting aside of the ex parte APO was more compelling when viewed against the delay in filing the fourth suit and the application for inter parte. There was a delay of almost ten months which did not support the urgency of the ex parte application. The delay would also show there was no real possibility the appellants might destroy the evidence in their possession (see paras 75 & 77).

(3) The contention that the delay was caused by the attempts for an amicable settlement which was unsuccessful did not hold water. Further, when there was discussion for settlement, this would show there was no fear of destruction of evidence. When the settlement failed, the situation was unlikely to have changed in terms of the risk of destruction of evidence. In the circumstances, the HCJ had erred and was plainly wrong when allowing the inter parte application for APO and in dismissing the applications to set aside the ex parte APO. In the circumstances, Appeals 370, 371, 408 and 410 were allowed with costs. The decision of the HCJ was set aside. Appeals 372 and 409 on the refusal for stay were struck out with no order as to costs (see paras 78 & 80–86).

[Bahasa Malaysia summary

erdapat enam rayuan didengar bersama di hadapan mahkamah ini. Ianya adalah Rayuan 370, 371, 372, 408, 409 dan 410. Kesemuanya adalah saling berkaitan daan berasal dari dua keputusan hakim Mahkamah Tinggi ('HMT') yang menolak permohonan defendan ('perayu') untuk mengenepikan perintah ex parte anton piller ('APO') dan membenarkan permohonan plaintif ('responden') untuk APO inter parte. Rayuan 372 dan 409 adalah terhadap keputusan HMT yang menolak penangguhan perlaksanaan penghakiman, namun telah ditarik balik pada hari pendengaran. Dalam Rayuan 370 dan 371, perayu pertama ('Zahid') adalah ketua pegawai eksekutif ('CEO') responden dari 2007 sehingga penggantungannya pada 28 Mac 2019. Beliau juga merupakan pengarah dan pemegang saham. Perayu kedua ('FBSB') adalah sebuah syarikat di mana Zahid adalah pemegang saham dan pengarah tunggalnya. Dalam Rayuan 408 dan 410, perayu pertama ('FBGSB') adalah sebuah syarikat yang mana perayu kedua ('Munir') adalah pemegang saham dan pengarah tunggal. Salah seorang pengasas bersama responden ialah Jason Jonathan Lo ('Jason') dan dia adalah Ketua Pegawai Eksekutif dari 27 September 2001. Zahid telah dilantik sebagai pengarah pada 12 Ogos 2003. Pada bulan Julai 2007, Jason meletak jawatan sebagai Ketua Pegawai Eksekutif dan pengarah responden. 70% saham Jason dipegang oleh Yakub bin Hussaini ('Yakub') melalui pengisytiharan amanah. Zahid kemudiannya dilantik sebagai CEO dan Yakub dilantik sebagai pengarah. Sebagai Ketua Pegawai Eksekutif, Zahid adalah penandatangan tunggal akaun CIMB Bank Bhd ('CIMB') responden yang merupakan akaun utama responden untuk semua transaksi perniagaan dan akaun Bank Kerjasama Malaysia Bhd ('Bank Rakyat'). Beliau dan Yakub kedua-duanya adalah penandatangan akaun RHB Bank yang boleh ditandatangani oleh mana-mana pihak. Pada Oktober 2018, Zahid mendapat tahu Jason telah dilantik sebagai pengarah responden melalui resolusi bertulis pemegang saham dan resolusi pengarah bertarikh 9 Julai 2018. Menurut Zahid, resolusi ini tidak pernah diluluskan olehnya sebagai salah seorang pemegang saham dan pengarah daripada responden. Oleh itu, Zahid memfailkan saman pemula ('saman pertama') untuk membatalkan pelantikan Jason sebagai pengarah tersebut. Mahkamah membenarkan injunksi interim

ex parte terhadap Jason untuk menghalangnya bertindak sebagai pengarah. Pada 22 November 2018, perintah persetujuan telah direkodkan di mana, antara lain, Jason akan meletakkan jawatan sebagai pengarah. Selepas itu, Zahid mendapat tahu bahawa Yakub telah melantik Jason semula, sebagai pengarah responden. Oleh itu, pada 25 Januari 2019, Zahid memfailkan saman pemula ('saman kedua') untuk membatalkan pelantikan Jason sebagai pengarah tersebut. Saman kedua telah ditolak oleh Mahkamah Tinggi dan rayuan kepada Mahkamah Rayuan dan kebenaran merayu kepada Mahkamah Persekutuan juga ditolak. Zahid kemudian memfailkan satu lagi saman pemula ('saman ketiga') terhadap responden dan Yakub kerana tindakan menindas. Responden kemudiannya memfailkan saman sivil ('saman keempat') terhadap semua perayu. Berbangkit daripada saman keempat, APO ex parte telah dibenarkan. Mahkamah Tinggi mendengar dan menolak permohonan perayu untuk mengenepikan APO ex parte tersebut. Terkilan, perayu merayu atas alasan, antara lain, bahawa responden tidak memenuhi syarat untuk mendapatkan APO ex parte. Antara alasan-alasannya adalah: (a) kelewatan yang melampau; (b) kegagalan untuk membuat pendedahan penuh dan berterus terang; (c) dokumen tersebut boleh didapati melalui penemuan; (d) tiada kes prima facie yang kuat; dan (e) tiada bukti bahawa perayu akan memusnahkan keterangan-keterangan.

Diputuskan, membenarkan rayuan-rayuan:

(1) Kewajipan responden sebagai pemohon adalah dengan membuat pendedahan penuh dan berterus terang seperti yang diperuntukkan di dalam A 29 k 1(2A) Kaedah-Kaedah Mahkamah 2012 ('KKM 2012'). Perkataan 'apa-apa fakta yang boleh membawa kepada mahkamah untuk tidak membenarkan permohonan secara ex parte atau sama sekali' dalam k 1(2A)(e) haruslah berkaitan dengan fakta material. Dalam rayuan ini, tiada pendedahan penuh dan berterus terang mengenai fakta-fakta material yang berkaitan kerana terdapat ketidakdedahan: (a) pertuduhan pecah amanah di mahkamah sesyen terhadap Jason dan Yakub yang menimbulkan isu sama ada APO yang dipohon adalah remedi yang sah atau merupakan satu sifat balas dendam dan tindakan balas yang berniat jahat terhadap Zahid dan perayu-perayu lain; dan (b) tindakan penindasan di mana kepentingan Zahid sebagai ahli responden telah diabaikan berhubung dengan pertukaran penandatangan di akaun CIMB tersebut. Hal ini menjurus kepada ketidakpatuhan A 29 k 1(2A)(e) KKM 2012 yang menyebabkan APO ex parte diketepikan. Akibatnya, permohonan inter parte tersebut mestilah ditolak (lihat perenggan 58–59, 61–62, 64, 68 & 74).

(2) APO ex parte wajar ditolak memandangkan terdapat kelewatan memfailkan saman keempat dan permohonan untuk inter parte. Terdapat kelewatan hampir sepuluh bulan yang tidak menyokong keperluan untuk permohonan ex parte disegerakan. Kelewatan tersebut

juga menunjukkan perayu tidak mempunyai kemungkinan akan memusnahkan keterangan di dalam milikan mereka (lihat perenggan 75 & 77).

(3) Hujahan bahawa kelewatan tersebut disebabkan oleh percubaan untuk penyelesaian yang mana akhirnya tidak berjaya tdak boleh dipertahankan. Tambahan pula, apabila terdapat perbincangan untuk penyelesaian, ini menunjukkan bahawa tiada kemungkinan untuk memusnahkan keterangan. Apabila penyelesaian gagal tersebut, keadaan tersebut tidak mungkin berubah dari segi risiko pemusnahan keterangan. Dalam keadaan tersebut, HMT telah tekhilaf dan jelas salah apabila membenarkan permohonan inter parte untuk APO tersebut dan menolak permohonan untuk mengenepikan APO ex parte. Dalam keadaan tersebut, Rayuan 370, 371, 408 dan 410 dibenarkan dengan kos. Keputusan HMT diketepikan. Rayuan 372 dan 409 mengenai permohonan penggantungan penghakiman yang tidak dibenarkan juga telah dibatalkan tanpa perintah untuk kos (lihat perenggan 78 & 80–86).]

Cases referred to

Anton Piller KG v Manufacturing Processes Ltd and others [1976] 1 All ER 779, CA (refd)
Apparatech (M) Sdn Bhd v Ng Hock Chong & Anor [2006] 2 MLJ 61, HC (refd)
Arthur Anderson & Co v Interfood Sdn Bhd [2005] 6 MLJ 239, CA (refd)
Brink's Mat Ltd v Elcombe and Others [1988] 1 WLR 1350, CA (refd)
Jaya Sudhir Jayaram v Nautical Supreme Sdn Bhd & Ors [2019] 5 MLJ 1, FC (refd)
Montreal Trust Company of Canada v Call-NetEnterprises Inc et al [2002] OTC 60 (refd)
Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67, FC (refd)

Legislation referred to

Rules of Court 2012 O 29, O 29 r 1(2A), (2A)(e)

Appeal from: Suit No WA-22NCVC-472–09 of 2022 (High Court, Kuala Lumpur)

Abdul Rashid bin Ismail (with Gabrieile Su May Ee) (Rashid Zulkifli) in Civil Appeal Nos W-02(IM)(NCC)-370–02 of 2021, W-02(IM)(NCC)-371–02 of 2021 and W-02(IM)(NCC)-372–02 of 2021 for the appellants.
Shafrin Halim (with Syazwan Halim) (Halim & Ismail) in Civil Appeal Nos W-02(IM)(NCC)-408–02 of 2021, W-02(IM)(NCC)-409–02 of 2021 and W-02(IM)(NCC)-410–02 of 2021 for the appellants.
Choo Dee Wei (with Azzuan Shah bin Abdul Razak) (Choo Dee Wei) in Civil

Appeal Nos W-02(IM)(NCC)-370–02 of 2021, W-02(IM)(NCC)-371–02 of 2021, W-02(IM)(NCC)-372–02 of 2021, W-02(IM)(NCC)-408–02 of 2021, W-02(IM)(NCC)-409–02 of 2021 and W-02(IM)(NCC)-410–02 of 2021 for the respondent.

See Mee Chun JCA (delivering judgment of the court):

INTRODUCTION

[1] Pursuant to a consolidation order dated 29 March 2021, there are six appeals heard together before the court. They are Appeals 370, 371, 372, 408, 409 and 410. All are inter-related and arise from two decisions of the High Court judge ('HCJ') in dismissing the appellants/defendants applications to set aside an ex parte Anton Piller order ('APO') and granting the respondent/plaintiff application for an inter parte APO.

[2] Appeals 372 and 409 which deal specifically with the HCJ decision in refusing stay, were withdrawn on hearing day.

[3] We allowed the appeals and give our reasons as follows.

PARTIES

[4] The respondent in all appeals is a company carrying out businesses relating to hosting, performance and studio recording.

[5] In Appeals 370 and 371, the first appellant ('Zahid') was the chief executive officer ('CEO') of the respondent from 2007 until his suspension on 28 March 2019. He is also a director and shareholder. The second appellant ('FBSB') is a company whose nature of business is the production, producing and event management of which Zahid is its sole shareholder and director.

[6] In Appeals 408 and 410, the first appellant ('FBGSB') is a company whose activities are television programming and broadcasting, video and television programme production, organisation, promotions and/or management of events. The second appellant ('Munir') is the sole shareholder and director in FBGSB.

BACKGROUND FACTS

[7] One of the co-founders of the respondent was Jason Jonathan Lo ('Jason') and he was the CEO from 27 September 2001. Zahid was appointed as director on 12 August 2003. On 16 February 2006, Jason held 70% shares and Zahid 30%. Sometime in July 2007, Jason left the respondent to be the

CEO of Tune Talk Sdn Bhd ('Tune Talk') and he resigned as CEO and director of the respondent. Jason's 70% shares were held by Yakub bin Hussaini ('Yakub') via a declaration of trust. Zahid was appointed the CEO. Yakub was appointed as director on 11 March 2009. From 5 December 2017, Zahid held 40% and Yakub 60%.

[8] As the CEO, Zahid was in charge of and responsible for the management of the respondent. Zahid was also the sole signatory of the respondent's CIMB Bank Bhd ('CIMB') account which is the respondent's main account for all business transactions and the Bank Kerjasama Malaysia Bhd ('Bank Rakyat') account. He and Yakub were both signatories to the RHB Bank account which either one may sign.

[9] The respondent had appointed PKF Covenant Sdn Bhd ('PKF') to investigate the respondent's financial activities from Financial Year End ('FYE') 2015 to 2018.

PROCEEDINGS IN THE HIGH COURT

First suit

[10] In October 2018, Zahid found out that Jason was appointed as director of the respondent through a Shareholder's Written Resolution and Directors' Resolution dated 9 July 2018. According to Zahid, these resolutions were never approved by him as one of the shareholders and directors of the respondent.

[11] On 5 November 2018, Zahid filed Originating Summons No WA-24NcVc-2254 of 2018, subsequently changed to WA-24NCC-589–11 of 2018 ('first suit') to void the appointment of Jason as a director. On 9 November 2018 the court allowed an ex parte interim injunction against Jason to restrain him from holding himself out as director or carrying out any act or action as director. On 22 November 2018 a consent order was recorded where Jason was to resign as director without admission of liability as to the validity of the appointment, PKF to proceed with the forensic audit of the respondent's accounts and the costs to be borne equally between Jason and the respondent and the Directors' Resolution passed on 25 October 2018 to suspend Zahid as CEO was set aside.

Second suit

[12] Zahid came to know that Yakub had appointed Jason on 7 January 2019 as director of the respondent.

[13] On 25 January 2019, Zahid filed Originating Summons

No WA-24NCC-43–01 of 2019 ('second suit') to invalidate Jason's appointment as director. The second suit was dismissed by the High Court on 6 March 2019, the appeal to the Court of Appeal dismissed on 7 November 2019 and leave to appeal to the Federal Court dismissed on 23 June 2020.

Third suit

[14] On 24 July 2019, Zahid filed Originating Summons No WA-24NCC-399–07 of 2019 ('third suit') against the respondent and Yakub for oppressive conduct. On 24 September 2019, the respondent filed a notice of application for the third suit to be continued as a writ. The application was dismissed by the High Court on 25 September 2019. The respondent filed an appeal which has since been withdrawn.

[15] The third suit is ongoing.

CURRENT FOURTH SUIT

[16] On 28 September 2020, the respondent filed Civil Suit No WA-22NCC-472–09 of 2020 ('fourth suit') against all the appellants.

[17] As against Zahid, it was for breach of director's duty such as unauthorised issuance of his own salary; unauthorised increment of his salary and bonuses; excessive and unverified claims; unlawful financial assistance to himself; created competition in FBSB and FBGSB (assisted Munir); misappropriation of assets; caused the freezing of monies in CIMB; caused liability to the respondent against the Inland Revenue Board ('IRD') and the initiation of RHB suit against the respondent.

[18] As against FBSB and FBGSB, it was for trademark infringement and passing off.

[19] It was further pleaded conspiracy as against all the appellants to injure the respondent.

Ex parte APO

[20] Arising from the fourth suit, an ex parte APO was granted on 9 October 2020 and amended on 14 October 2020. As per Schedule A of the APO, three premises were ordered to be searched; namely premises 1 (Zahid's residential address), premises 2 (FBSB's business address) and premises 3 (FBGSB's business address).

[21] The items to be seized and searched are both in physical and electronic format as per Schedule B of the APO. These included but were not limited to the respondent's assets including equipment and documents), FBSB and FBGSB list of clients, human resources documents, project listing, Zahid's emails and FBSB and FBGSB secretarial documents.

Execution of ex parte APO

[22] Three sets of supervising solicitors ('SS') were appointed in respect of the execution of the APO for all premises.

[23] Execution on premises 1 was conducted on 15 October 2020, could not be executed on premises 2 and on premises 3 on 15 October 2020, 16 October 2020 and 19 October 2020. Physical documents were seized. Electronic data were imaged by Virdos Lima Consultancy (M) Bhd (Virdos), the forensic IT Company, from Zahid's handphone and IPad and 25 devices in premises 3 comprising of laptops and computers.

Inter parte proceedings and applications to set aside

[24] Along with the inter parte proceedings ('encl 3'), the HCJ also heard the applications to set aside by both sets of appellants (encl 26 by Zahid and FBSB and encl 28 by FBGSB and Munir). On 19 February 2021, the HCJ granted encl 3 and dismissed encls 26 and 28.

HCJ's grounds

[25] The HCJ's brief grounds are as follows:

> Encl 3:
>
> brief main reasons includes among others — having considered the affidavit evidence adduced by the parties including the reports submitted by the Supervising Solicitors and the parties' submissions therein, I am satisfied that the Respondent has fulfilled the legal threshold for the granting of an inter partes Anton Piller order which includes, among others:
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> – the affidavit evidence shows the P has an extremely strong prima facie case against the D1-A4
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> – considering the factual circumstances as whole: the Respondent would suffer very serious damage if the APO is not granted and there is a real possibility that the defendant may destroy documents/materials in particular the electronic data that were imaged during execution of the ex parte APO dated 9/10/2020 at A1 Premises and A3 Premises which has yet to be duly processed
>
> – and the documents and equipment seized at A3 Premises during execution of the ex parte APO which has yet to be jointy itemized.

A Encl 3 is allowed with cost' encl 26 and 28:

main brief reasons includes, among others that the non-disclosure as contended by the A1–A4 is not material as to have caused this court to be misled when granting the ex parte AP dated 9/10/2020.

B

[26] As noted in para 28 of the respondent's submission dated 14 September 2021, the above is taken from a screenshot of the e-review session when the HCJ delivered decision.

C *Submissions of the appellants (Appeals 370 and 371)*

[27] The dispute between Jason and Zahid began when Jason offered three options in relation to the shares of the respondent wherein the shares of the respondent were worth much less than the valuation proposed.

D

[28] The broad areas of contention were on abuse of process in that the APO was applied for with a motive to maliciously target Zahid as revenge and retaliation and not as a genuine remedy; no full and frank disclosure; and misleading averments.

E

[29] The revenge and retaliation were because of criminal breach of trust ('CBT') charges against Jason and Yakub which Jason said were orchestrated by Zahid.

F

[30] The true purpose and intent of the APO was evident from the press conference given by Jason after he was charged on 1 September 2020. The fact that the documents sought in the APO could have been obtained by discovery fortifies the intention of Jason to exact revenge and retaliation.

G

[31] Further, the CBT charges and Jason's arrest for drug related offences had not been disclosed. The CBT charges are material facts as it shows Jason's true intention to seek the APO. The arrest is material as it led to the breakdown in mutual trust and confidence between Jason and Zahid. There was also
H non-disclosure of oppressive conduct wherein Zahid's interest as a member of the respondent had been disregarded with regard to the change of signatory to the CIMB account and the harassment of the solicitors.

[32] The misleading averments were, inter alia, Zahid had obstructed PKF
I without disclosing the full events and had not disclosed that Jason had locked the respondent's premises thereby locking out Zahid and PKF.

[33] It was further contended that the respondent did not have an extremely strong prima case required to secure the APO and instead relied on a good

arguable case. The alleged breaches of director's duties on unauthorised salaries and bonuses or excessive unverified claims were expenses incurred in the ordinary course of the respondent's business and were consented to by the shareholders. Since 2009, the audited accounts with the yearly expenditure including salaries and bonuses were presented to Yakub who has been signing them. Yakub being the director primarily responsible for the financial management had signed the statutory declarations the financial statements were correct from 2009 to 2017.

[34] There was no competition with the respondent and no passing off or infringement of trademark nor conspiracy.

[35] The alleged liability towards CIMB, RHB and IRD were attributed to the conduct of Jason. In particular the freezing of the CIMB account was due to the respondent changing the signatory without Zahid's consent.

[36] There was also a delay in filing the inter parte application. In filing the fourth suit and encl 3 on 28 September 2020, the respondent had relied on the PKF report which was completed on 5 November 2019. There was a delay of almost a year which does not support the urgency of the ex parte application.

[37] The APO was not necessary when pre-trial discovery could have been applied. The documents sought would also be in the custody of the respondent's company secretary, auditors, ex-employees and in the respondent's premises. There was further no evidence of a real risk of destruction of the evidence.

[38] There was an attempt to vary the APO contrary to the terms, which warranted the setting aside.

Submissions of the appellants (Appeals 408 and 410)

[39] It was submitted the respondent had not met the requirements to secure the ex parte APO. The reasons advanced were inordinate delay, failure to make full and frank disclosure, documents could have been obtained by discovery, no extremely strong prima facie case and no evidence the appellants would be destroying evidence. We note the facts relied on were similar to the appellants in Appeals 370 and 371.

[40] It was next submitted there had been a breach of the APO when the respondent had undertaken unilateral itemisation of documents in the absence of the appellants and there was an attempt to vary the terms of the APO when it was not provided for.

Submissions of the respondent

[41] It was submitted that the respondent had made out a strong prima facie case against the appellants from the face of the pleadings and the affidavits. There were breaches by Zahid of his director's duty where PKF was appointed to investigate the respondent's financial activities during his tenure from FYE 2015 to 2018. Zahid had hindered PKF's investigations by filing the first to third suits. Although the consent order from the first suit stated PKF's investigations were to resume without obstruction, Zahid restricted PKF's access to the respondent's premises and the books and records, delayed in furnishing documents, removed files and documents and refused to respond to PKF's request for documents and to fix appointments/meetings. PKF's report was circulated to all directors including Zahid for comments who chose to remain silent. Only when the report was finalised to be conclusive was there an objection. He has also never engaged another auditing firm to rebut the PKF report and the report is prima facie evidence of his breach of duty as a director.

[42] Zahid had also incorporated FBSB and assisted in creating FBGSB which were competitors to the respondent. He was alleged to be the CEO of FBGSB. The trademark infringement and passing off were met with only bare denials.

[43] Zahid had misappropriated the respondent's assets by removing accounting documents, company and secretarial documents, human resources documents, studio equipment, computers and laptops.

[44] The liability towards CIMB, RHB and IRD were on account of the conduct of Zahid.

[45] The acts above would show a prima facie case of conspiracy to injure the respondent.

[46] On the variation to the APO, one of the terms was that the processing of the electronic data shall be conducted in the SS Premises 1's office of which Virdos is required to set up mobile workstations therein to commence the processing. As there were 27 electronic devises seized, Virdos would require at least 16 days for processing. The respondent thus proposed the processing be done at Virdos, in a designated locked room with the key to be held by SS. Virdos agreed to the proposal as did SS for premises 1 and 3. Zahid and FBGSB solicitors replied that client's instructions would need to be procured and finally objected on the basis of it being a variation to the APO. The processing did not commence.

[47] With regard to the joint itemisation as required by FBGSB, the

respondent objected to it as the inventory list prepared was sufficient to be identified. Subsequently, FBGSB's new solicitor objected to the joint itemisation and that it was a variation of the APO. This inconsistent stand showed the appellants have something to hide.

[48] There would be serious damage to the respondent's case if it is unable to ascertain the true figure and the detailed amount of equipment and documents misappropriated.

[49] Although the respondent did not disclose the facts as stated by the appellants, it was submitted the requirement of full and frank disclosure is only in respect of material facts which would affect the granting of the APO. The CBT charges are immaterial as it does not affect Zahid's liability in relation to the RHB account. The same goes for the change of signatory where the freezing of the CIMB account was caused by Zahid. Jason's arrest was never averred in any of the affidavits. In any event, the arrest has nothing to do with the management of the respondent and does not permit Zahid's breaches as a director. The harassment of the solicitors was never averred as a non-disclosure and is not material and relevant to the granting of the APO.

[50] The delay was not substantial and was caused by attempts for an amicable settlement which were unsuccessful. In any event, attempts for an amicable settlement are justifiable reason for the delay as per the Federal Court in *Jaya Sudhir Jayaram v Nautical Supreme Sdn Bhd & Ors* [2019] 5 MLJ 1.

[51] The APO is an exercise of the respondent's rights. Further, when APO is viewed as against discovery, an APO is to preserve evidence necessary for its case especially when the appellants conduct have demonstrated a danger of the Listed Items being concealed and/or destroyed.

[52] There were no misleading averments. It was Zahid who obstructed PKF where even PKF's advisor had averred in affidavits in the third suit and stated in the SS's reports. On the handover of assets, the fact that many documents were discovered through the execution of the APO would show no proper handover. Although Jason did lock up the respondent's premises, this was after Zahid's suspension. The issue pertains to the locking up during Zahid's tenure as CEO.

OUR DECISION

[53] As can be seen from the submissions of parties, many issues were raised to support or oppose the appeals. We do not propose to deal with each and every single one of them. It suffices if we only deal with what we consider to be the critical issues which form the basis for our decision.

Requirements for an APO

[54] We begin with the test for an APO which is that of an extremely strong prima facie case. This has been laid out in the case from which the order for Anton Piller derives its name. In *Anton Piller KG v Manufacturing Processes Ltd and others* [1976] 1 All ER 779 this was stated at p 784:

> ... The proposed order is at the extremity of this court's powers. Such orders, therefore, will rarely be made, and only when there is no alternative way of ensuring that justice is done to the plaintiff.
>
> There are three essential pre-conditions for the making of such an order, in my judgement. First, there must be an extremely strong prima facie case. Secondly, the damage, potential or actual, must be very serious for the plaintiff. Thirdly, there must be clear evidence that the defendants have in their possession incriminating documents or things, and that there is a real possibility that they may destroy such material before any application inter partes can be made.

[55] The same was said by this court in *Arthur Anderson & Co v Interfood Sdn Bhd* [2005] 6 MLJ 239 at p 253:

> [31] It is settled that the basic requirements to be satisfied by an applicant for an Anton Piller order at an ex parte stage are as follows:
>
> (a) to disclose an extremely strong prima facie case;
>
> (b) that a refusal to grant the order will have a very serious effect to the applicant;
>
> (c) that it must be established that the defendant has in its possession the relevant documents and/or materials being sought for and that there is a real possibility that the defendant may destroy such documents and/or materials;
>
> (d) that the applicant is required to make a full and frank disclosure; and
>
> (e) that the order should contain the necessary undertakings and safeguards to be complied with upon its execution.

[56] At p 251, the following was said of the need to follow guidelines and safeguards incorporated in the highly persuasive cases it referred to earlier:

> [25] ... That is plain common sense. Otherwise it would be like arming an applicant with 'one of the law's two 'nuclear' weapons' per Donaldson LJ (as he then was) in *Bank Mellat v Nikpour* [1985] FSR 87 at p 90 to be used at his whims and fancies. Thus, we are entirely in agreement with the observation of the learned judge in the case of *Makonka Electronic Sdn Bhd v Electrical Industry Workers' Union & Ors* when he said:
>
> > It is a draconian order, granted by the court upon the balance of undertakings by the applicant and upon specific terms and conditions. Those terms, conditions

> and undertakings cannot be ignored or left for subsequent compliance at will. Compliance with the terms of the conditions and undertakings are necessary pre-conditions to the enforcement of the order ...

[57] The sum total of these leading authorities is that an APO is a draconian order akin to one of the law's two nuclear weapons for which the pre-requisites or requirements set out must be complied with.

FULL AND FRANK DISCLOSURE OF RELEVANT MATERIAL FACTS

[58] The duty of the respondent as the applicant to make a full and frank disclosure is contained in O 29 r 1(2A) of the Rules of Court 2012 ('the RC 2012') which states the following:

> (2A) The affidavit in support of an application made ex parte must contain a clear and concise statement of:
>
> (a) the facts giving rise to the claim;
>
> (b) the facts giving rise to the application for interim injunction;
>
> (c) the facts relied on to justify the application ex parte, including details of any notice given to the other party or, if notice has not been given, the reason for not giving notice;
>
> (d) any answer by the other party (or which he is likely to assert) to the claim or application;
>
> (e) any facts which may lead the Court not to grant the application ex parte or at all;
>
> (f) any similar application made to another Judge, and the order made on that application; and
>
> (g) the precise relief sought.

[59] A reading of the words 'any facts which may lead to the court not to grant the application ex parte or at all' in r 1(2A)(e) must necessarily relate to relevant material facts. Hence it must not just be the nondisclosure of any facts but relevant material facts.

[60] It is noted that in *Arthur Anderson,* a basic requirement as stated in item (d) was a full and frank disclosure. At p 255 the following was stated:

> [40] As expressed by the English courts it is also the law in this country that when applying for an ex-parte order an applicant is duty-bound to make an honest, full and frank disclosure of all relevant material facts within his knowledge, which failure may be a ground to set aside any order granted.

[61] In these instant appeals, we found there to be no full and frank

disclosure of relevant material facts. These are set out as follows.

Non-disclosure of CBT charges

[62] Firstly, there was a non-disclosure of the CBT charges in the sessions court on 1 September 2020 against Jason and Yakub. These CBT charges arose from the withdrawal of RM232,500 by way of three cheques dated 24 April 2019 from the respondent's RHB account (CBD5/35). These cheques were paid out on 14 May 2019 as evident from the 'Paid' chop. These cheques were prepared and cashed by Yakub without Zahid's knowledge, as the other signatory of the RHB account. RHB informed Zahid the cheques were cashed for the purpose of paying tax. By Yakub's solicitor letter dated 31 May 2019 (CBD5/47–48), Zahid was informed a part sum of RM58,000 was utilised to pay Jason's salaries for April and May 2019.

[63] As the money was withdrawn for the purpose of paying tax and part used for another purpose, this was the basis of the CBT charges. This was a relevant material fact as Jason had accused Zahid of being the person who orchestrated the CBT charges. The true purpose and intent of the APO may be gleaned from the press conference held by Jason after he had been charged. At CBD4/495 this was said:

> ... so that's why I am here, because this is to do with family, and when you are trying cause CBT on someone, it's a real scary thing because a 20 year, fine, all that, well I think they did the wrong thing because ... when you push people that far, when you push someone because you want them to get arrested you are only thinking one step ahead, and you forget that, I have this. (Referring to the PKF Forensic Report in hand) Now I have no choice but to throw this down. I have no choice. I don't want to send anyone to prison but, my family is not going go lose me, because I didn't do anything wrong. I think you, and I speak of nicely over here., you and your father and your uncle., your uncle who was there before and advised you can talk as big as he wants but we're coming after you soon.
>
> And I think we know what's coming. You all know what's coming. A lot of you want me to do this and I have no choice but to do it, but I do it reluctantly. I don't want anyone to experience what I experience, anyone. I don't even want people who did this to me to experience it, but it's coming and there's gonna be no way to stop it now. I do it reluctantly but unfortunately sometimes we have to do this because these are the building blocks for the future.
>
> And if we don't stop white collar crime, it's gonna get worse and families will break up and there's gonna be more pain, so this is all on my plate now. And I hope to God that I can do justice but more importantly that people get reckoning ...

[64] We find that the CBT charges give rise to the issue of whether the APO sought was a genuine remedy or an act of malicious revenge and retaliation against Zahid and by extension, the other appellants.

[65] The respondent did not dispute the CBT charges were not disclosed but that it was not materially relevant. This was because these did not affect Zahid's liability with regard to the RHB account. We have given our reasons above as to why they are relevant material facts.

[66] Further, it is not for the respondent to make the determination of whether what are relevant material facts. That is for the court to decide. This has been held in *Brink's Mat Ltd v Elcombe and Others* [1988] 1 WLR 1350 at p 1356 as follows:

> In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following, (1) The duty of the applicant is to make 'a full and fair disclosure of all the material facts:' see *Rex v Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac* [1917] 1 KB 486, 514, per Scrutton LJ:
>
> (2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: ...

[67] It may also well be that the true nature of the dispute between the parties in particular between Zahid and Jason, was a proxy fight or contest for control over the respondent. In the Superior Court of Justice of Ontario, Canada case of *Montreal Trust Company of Canada v Call-NetEnterprises Inc et al* [2002] OTC 60 (SupCt), Lax J described a proxy fight or contest in the following manner:

> [28] A proxy contest is a struggle for control. It is described in this way by the author of The Law and Practice of Canadian Business Corporations:
>
> A proxy contest or proxy fight is a struggle for control, almost always within an offering corporation, in which the combatants are the existing management group of directors within the corporation and non-management group, who are often called the insurgents. The object of each group is to gain control of sufficient proxies to elect a majority of the board of directors and thereby secure control of the corporation.

Non-disclosure of oppressive conduct

[68] Secondly, there was also non-disclosure of oppressive conduct wherein Zahid's interest as a member of the respondent had been disregarded with regard to the change of signatory to the CIMB account. This is a relevant material fact as it relates to the allegation that Zahid is the only person to be blamed over the freezing of the respondent's CIMB bank account.

[69] We noted earlier that Zahid was the sole signatory of the CIMB account and that this was the respondent's main account for all business transactions. The bank signatories were changed without Zahid's knowledge and authorisation by a Board of Directors' resolution on 25 October 2018 (CBD5/62) to include and authorise Jason as the sole bank signatory. Further, we note the Notice of Board Meeting dated 4 October 2018 (CBD5/81) did not contain a specific agenda to change the CIMB account bank signatory. These were a red flag to Zahid and hence it would be reasonable for him to lodge a police report on 21 February 2019 and to inform CIMB that there was an ongoing boardroom dispute.

[70] The respondent's oppressive conduct in this matter was indeed a relevant material fact to be disclosed as it addressed head on the allegation that Zahid was the one to be blamed for the CIMB account being frozen. If such oppressive conduct had been disclosed it may well have led to the inference that Jason was to be blamed. As it turned out, between 26 November 2019 to 10 July 2020 when Jason and Yakub were managing the respondent, all the funds in CIMB account had been withdrawn. This compares to the available balance of RM 1,025,768.58 as at 26 November 2019 (CBD5/85).

Effect of non-disclosure

[71] It cannot be gainsaid that the terms of O 29 r 1(2A) of the RC 2012 must be strictly complied with.

[72] We had earlier referred to *Arthur Anderson* at p 255 where the failure to disclose all relevant material facts may be a ground to set aside.

[73] The High Court in *Apparatech (M) Sdn Bhd v Ng Hock Chong & Anor* [2006] 2 MLJ 61 at p 73 referred to a judgment of Clement Skinner J who in turn referred to Gopal Sri Ram:

> [40] Clement Skinner J in *UMAS Sendirian Berhad v RHB Bank Berhad & Anor* [2001] 1 AMR 1024 emphasised the need to comply strictly with r 1(2A) of O 29 of the RHC and this was what His Lordship said (see p 1042 of the report):
>
> The consequence of the plaintiff's failure to comply with r 1(2A) of O 29 is that the injunction having being obtained in breach of r 1(2A) which requires strict compliance with its terms, it must be discharged, to do otherwise would defeat the policy behind the introduction of r 1(2A). To this end I would refer to the clear direction of the Court of Appeal to High Court judges in this particular regard in the case of *Motor Sports International Ltd (servants or agents at Federal Territory of Labuan) & Ors v Delcont (M) Sdn Bhd* [1996] 2 MLJ 605. Although that was a case involving the grant of a Mareva injunction on an ex parte summons, I nevertheless regard what was stated there as applying to all injunctions granted on an ex parte basis and binding on me. This is what his Lordship Gopal Sri Ram JCA speaking for the Court of Appeal said at p 611:

> The provisions of O 29 r 1(2A) were introduced by amendment in order to ensure that ex parte injunctions of any sort were not granted willy-nilly, but only in cases where they were truly called for. In order to ensure that the policy behind the introduction of r 1(2A) is not defeated, High Courts must demand strict compliance with its terms. More so, when the relief applied for is in the nature of a Mareva or an Anton Piller type of injunction because of the incalculable harm and damage that may be caused to a defendant by the grant of either of these orders ...

[74] It follows that non-compliance of O 29 r 1(2A)(e) of the RC 2012 requiring the frank and full disclosure of relevant material facts in the form of the CBT charges and the respondent's oppressive conduct, which must necessitate the ex parte APO to be set aside. As a consequence, the inter parte application must be dismissed.

Delay

[75] The setting aside of the ex parte APO is all the more compelling when viewed against the delay in filing the fourth suit and the application for inter parte. In filing the fourth suit and encl 3 on 28 September 2020, the respondent had relied on the PKF report which was completed on 5 November 2019. There was a delay of almost ten months which does not support the urgency of the ex parte application.

[76] Jason had averred that the fourth suit was supposed to be a counterclaim in the third suit. The respondent had applied for the third suit to be converted into a writ and to include a counterclaim. The application was dismissed on 25 September 2019. When it was dismissed, the respondent ought to have filed the fourth suit immediately as it was ready to proceed against the appellants.

[77] The delay would also show there was no real possibility the appellants may destroy the evidence in their possession.

[78] The respondent said any delay was caused by attempts for an amicable settlement which was unsuccessful. It referred to *Jaya Sudhir Jayaram v Nautical Supreme Sdn Bhd & Ors* [2019] 5 MLJ 1 which held that attempts for an amicable settlement is a justifiable reason for delay. At p 38, this was said:

> [86] ... With respect, the Court of Appeal fell into error on the issue of delay. We are satisfied that the alleged delay is 'explicable and the forbearance of parties who are in the midst of settlement negotiations is an acceptable and satisfactory explanation in the circumstances of this case. It would be unreasonable for the appellant to rush off to the court the moment the disputes arose. He had ongoing relationship with the respondents and negotiations towards settlement of the disputes and we can understand as did the learned High Court judge, the reluctance on the part of the appellant to file the application for injunction. We accept such reluctance was for

good reasons premised on a commercial reality.

[79] We note that *Jaya Sudhir* dealt with an injunction to restrain the respondents from proceeding and continuing with on-going and parallel arbitration commenced by the first respondent against the second and third respondents and an originating summons. The considerations for delay may well differ in such instances.

[80] Further, when there is discussion for settlement, this would show there was no fear of destruction of evidence. We also considered that when the settlement failed, the situation was unlikely to have changed in terms of the risk of destruction of evidence.

Appellate intervention warranted

[81] For the reasons given above, we are constrained to find that the HCJ had erred and was plainly wrong, as per *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67, when allowing the inter parte application for APO and in dismissing the applications to set aside the ex parte APO.

CONCLUSION

[82] We allow Appeal 370. The decision of the HCJ dated 19 February 2020 is set aside and substituted with an order in terms of prayers 1, 2, and 3 of encl 26 and damages to be assessed.

[83] We allow Appeal 371. The decision of the HCJ dated 19 February 2020 is set aside and substituted with encl 3 is dismissed.

[84] We allow Appeal 408. The decision of the HCJ dated 19 February 2020 is set aside and substituted with an order in terms of prayers 1, 2, and 3 of encl 28 and damages to be assessed.

[85] We allow Appeal 410. The decision of the HCJ dated 19 February 2020 is set aside and substituted with encl 3 is dismissed.

[86] Appeals 372 and 409 on the refusal for stay are struck out with no order as to costs.

[87] We award costs of RM10,000 each, here and below for appeals 370 and 408. We award costs of RM20,000 each, here and below for appeals 371 and 410. All costs are subject to allocatur.

Appeals allowed.

Reported by K Selvaraju